STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN03SB-66977

Cynthia A. D'Onofrio,	)	
	)	
Complainant,	)	Administrative Action
	)	
v.	)	**FINDING OF**
	)	**PROBABLE CAUSE**
Buckley Funeral Home, Inc.,	)	
	)	
Respondent.	)	

On May 17, 2018, Cynthia A. D'Onofrio (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Buckley Funeral Home, Inc. (Respondent), discriminated against her based on gender and fired her in reprisal for complaining about the discrimination, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

Summary of Investigation

Respondent is a family-owned funeral home located in Asbury Park. In a pro-se answer to the complaint, Richard K. Buckley described himself as president, manager and half-owner of Respondent. Richard wrote the answer to the complaint and submitted it on behalf of Respondent.

On or about November 8, 2017, Respondent hired Complainant as an administrative assistant. Richard fired her on November 28, 2017, only a few weeks after her start date.

In an interview with DCR, Complainant said that from the start of her employment, Richard addressed her using unwelcome sexist terms, such as "hon" and "doll," on a daily basis.[1] She did not complain about this until the day she was fired. According to Complainant, on that day, she was sitting at an L-shaped desk working at her computer, and Richard, who was standing behind her, was repeatedly and intentionally "nudging" her shoulder, elbow and arm, while giving her typing instructions. As he pointed at the computer, he twice brushed her breast with his hand. Complainant told DCR that she believed the brushes against her breast were not intentional, but were more of a "disregard" of her personal space. She stated that she said, "Please don't touch me and stop calling me 'hon'." Richard then became angry, punched the chair near her head, and yelled, "Get up. Get your stuff and get out." Complainant told DCR that she was speechless; she grabbed her bag and left the building. Complainant stated that Richard's brother—Dennis Buckley—was present during the November 28, 2017 incident.

[1] The verified complaint alleged that Richard also said "Women are a pain in the ass." During DCR's investigation, Complainant clarified that she never heard Richard say that, but she heard him complain about three female customers (who were not present) by saying, "These women are busting my balls." In an interview with DCR, Richard denied making any such comment.

In a an interview with DCR and in his submissions in response to the complaint, Richard acknowledged that he sometimes addressed Complainant and others using the term, "hon," but maintained that he never called Complainant or anyone else "doll."

Richard told DCR that on the day he fired Complainant, he was standing next to Complainant at the desk when she mumbled something. In his written answer, he described what occurred next as follows:

> On the day of her release, we were both looking at a computer screen in our office, while my brother was about 10 feet away in the closet…. we were filing an application that neither of us were familiar with. As we looked at the screen she was talking in a low voice and as usual I didn't know if she was talking to me about the form or what, so I touched her forearm with the back of my fingers and asked, "Are you talking to me, Hon, because I really don't know what you're saying?["] She then said without looking up "Don't hit me and don't call me, Hon". I was shocked at what she said and was implying. I didn't hit her at all and what was this about my referring to her as "hon"? Where did all this come from? This was not sexist or degrading in any on my part. I said it in the calmest way I could think of considering that I had complained before to her about her constantly mumbling and talking to herself.
>
> The simple fact is I was not happy with her on multiple aspects of her work and this bizarre accusation of me hitting her was the last straw. I could not work with this secretary any longer and the three week work stint proved it. Dissatisfaction not Discrimination was the reason for her termination.
> [*sic* throughout]

In an interview with DCR, Richard again stated that after he touched Complainant's arm, she told him not to hit her and to stop calling her "hon," and in response, he fired her.

During DCR's investigation, Complainant maintained that she never accused Richard of hitting her, but merely said that he should not touch her, and should stop calling her "hon."

As noted above, Richard contended that he was not satisfied with Complainant's performance. In his response to the complaint, Richard wrote:

> From her first day, [Complainant] seemed to be very hard to converse with and frequently did not respond to normal conversion but when doing a task she talked to herself and I frequently had to ask her what she said and to whom she was speaking. [She] often deleted many E-mails without asking and I thought we were having trouble getting our e-mails since she denied removing any. Because of her I responded to an E-Mail that claimed our mail was held up and I must respond by logging into our account on their "AOL" site to have it released. We were then hacked and all our contacts received letters claiming I was in need of emergency money which was very embarrassing to say the least. Her computer and business

> skills were not as good as I was lead to believe and I was very uncertain of her continuing her job because her performance and demeanor, but I was determined to give her a chance.
> [*sic* throughout]

DCR interviewed Richard's brother, Dennis Buckley, who was a half-owner of the funeral home and the only other person who worked there, along with Complainant and Richard. Dennis said that he was at the funeral home when Complainant was fired, but did not hear the exchange that prompted Richard to discharge her. Dennis did not corroborate Richard's contention that there were ongoing problems with Complainant's work performance. When asked why his brother fired Complainant, he replied that they "did not get along." When asked to explain or give examples of how they did not get along, he reiterated, "They just didn't get along, that's all."

DCR interviewed [redacted], who worked for Respondent for eight years before retiring. She stated that Richard never referred to her as "hon" or "doll," never touched her, and never said anything that she considered inappropriate or that made her feel uncomfortable. She stated that they had a friendly and professional relationship.

DCR asked Complainant to relay any additional incidents that would support her allegations of sexual harassment or a hostile work environment. Complainant said that she once heard Richard instruct someone on the phone to call back and speak to "my girl in the office," referring to her. On another occasion, he came into the office and expressed his frustration with three daughters of a deceased woman by stating, "These women are busting my balls." Complainant did not voice any objections or otherwise respond when Richard made these two comments.

Analysis

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid.

If DCR finds that there is no probable cause, then the finding is deemed to be a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

A finding of probable cause, on the other hand, is not a final adjudication on the merits, but merely an initial "culling-out process" in which the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

Sexual harassment in the workplace is a form of gender discrimination. See Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). To present a claim of hostile work environment sexual harassment, there must be evidence that the conduct occurred because of the employee's gender or was sexual in nature, and that a reasonable employee of the same gender would find the conduct severe or pervasive enough to alter the conditions of employment to make the working environment hostile or abusive. Id. at 603. In evaluating severity or pervasiveness, the courts consider the "nature of the conduct itself, 'rather than the effect of the conduct on any particular plaintiff.'" Barroso v. Lidestri Foods, Inc., 937 F. Supp. 2d 620, 632 n. 9 (D.N.J. 2013) (quoting El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 179 (App. Div. 2005)). A hostile work environment claim requires that the reviewer consider the totality of the circumstances, "which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance." Ibid.

When the harasser is the owner of the business, his or her conduct "carries with it the power and authority of the office." See Taylor v. Metzger, 152 N.J. 490, 505 (1998).

Here, Complainant alleges that Richard Buckley, who was her supervisor and part-owner of the business, routinely referred to her with demeaning gender-based terms such as "doll," and "hon," and on the day she was fired, repeatedly touched her arm, and brushed against her breast unintentionally, in an unwelcome manner. Richard admits calling Complainant "hon," and once touching her forearm with the back of his fingers. He denies ever calling her "doll" or any other unwelcome touching.

Referring to a female employee using demeaning gender-based terms such as "hon," "doll" and "girl" coupled with unwanted touching can constitute sexual harassment under the LAD. Here, however, Complainant was only employed by Respondent for three weeks, and there is insufficient evidence to suggest that a reasonable woman in Complainant's position would have found Richard's conduct severe or pervasive enough to alter the conditions of employment and make the working environment hostile or abusive at that point. Complainant alleged that in addition to calling her "hon" and "doll," Richard, on the day she was fired, repeatedly and intentionally "nudged" her shoulder, elbow and arm, while giving her typing instructions. As he pointed at the computer, he also twice brushed her breast. But Complainant told DCR that she believed the brushes against her breast were not intentional, but were more of a "disregard" of her personal space. Had Complainant stated that the unwelcome physical touching of her breast was intentional and not accidental, or had she stated that the intentional nudging of her shoulder, elbow and arm had occurred on more than one occasion, and despite her request that it stop, this would suffice to show a hostile work environment based on sex.

However, even if the conduct did not rise to the level of a hostile work environment in this case, the LAD also prohibits retaliation against an employee for objecting to what may appear to be harassment prohibited by the LAD. The LAD states in pertinent part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or … to coerce,

> intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

N.J.S.A. 10:5-12(d).

To establish a *prima facie* case of retaliation, the evidence must show that the employee engaged, reasonably and in good faith, in activity protected by the LAD; that the employer subjected her to a retaliatory action after learning of the protected activity; and that there was a causal connection between the two. Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007).

A complainant "need not prove the merits of the underlying discrimination complaint, but only that [s]he was acting under a good faith, reasonable belief" that discrimination or harassment had occurred. Id., citing Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996). See also Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 282 (4th Cir. 2015) ("an employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress"). If a complainant can make a *prima facie* showing, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its action. If the employer can meet that burden of production, then the complainant, who retains the burden of persuasion, has the opportunity to show that the employer's explanation was merely a pretext designed to mask unlawful reprisal. Young v. Hobart West Group, 385 N.J. Super. 448, 465 (App. Div. 2005).

In this case, the Director finds that Complainant engaged in protected activity when she objected to her male supervisor touching her and calling her "hon," and that Respondent thereafter subjected her to a retaliatory action when he fired her. It is undisputed that there was a causal connection between her voiced objection and Richard's decision to fire her. Richard acknowledged that her statement that he should not touch her or call her "hon" prompted him to fire her. Although Richard claimed that he had concerns about her performance, he acknowledged that when she voiced her objection, he viewed it as the "last straw," and determined that it was time to fire her. And although Richard asserted that he fired Complainant because of deficiencies in her work performance, Richard's brother Dennis did not corroborate the claim that Complainant's work performance was deficient.

In view of the above, the Director is satisfied that this matter should "proceed to the next step on the road to an adjudication on the merits." Frank, 228 N.J. Super. at 56.

Conclusion

Based on the investigation, the Director finds PROBABLE CAUSE to support the allegations in the verified complaint.

DATE: APRIL 18, 2019

RACHEL WAINER APTER
NJ DIVISION ON CIVIL RIGHTS